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Country Lane Construction, Inc. *and* Local 1234, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America. Case 7–CA–44949

August 27, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

This case is before the Board on the General Counsel's Motion for Default Summary Judgment. The General Counsel alleges that Country Lane Construction, Inc. (the Respondent) failed to timely answer the General Counsel's complaint.[1] The Respondent admits that it failed to file a timely answer, but asserts good cause for its failure to do so. The issue before the Board, therefore, is whether the reason proffered by the Respondent for its failure to file a timely answer constitutes good cause. We find, for the reasons set forth below, that good cause has not been established, and we grant the General Counsel's Motion for Default Summary Judgment.

Ruling on Motion for Default Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, as stated above, the undisputed allegations in the Motion for Default Summary Judgment disclose that the Region, by letter dated July 12, 2002[2] notified the Respondent that unless an answer was received by July 26, a Motion for Default Summary Judgment would be filed.

In its response to the Board's Notice to Show Cause, the Respondent claims that its owner, Gene Miller, "did not understand the Board's purpose, powers or procedures" when he received the complaint. Miller was acting pro se at the time he received the charge, amended charge, complaint, and the General Counsel's July 12 warning letter. The Respondent contends that Miller mistakenly believed that the Board was a union or was affiliated with unions.[3] Now represented by counsel, the Respondent has provided an answer to the complaint and asks the Board to order that the case be scheduled for hearing. For the reasons set forth below, we find that the Respondent has failed to establish good cause for the failure to file a timely answer.

In determining whether to grant a motion for default summary judgment on the basis of a respondent's failure to file a sufficient or timely answer, the Board has shown some leniency toward respondents who proceed without the benefit of counsel. *Kenco Electric & Signs*, 325 NLRB 1118 (1998); *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296 (1988). These cases, however, "generally involve respondents that have timely filed some written response that can reasonab[ly] be construed as denying the substance of the allegations contained in the complaint, or that have offered as good cause an explanation other than simply their pro se status." *Calyer Architectural Woodworking Corp.*, 338 NLRB No. 33, slip op. at 1 (2002). Here, the Respondent failed to file any type of timely response to the General Counsel's complaint. "[M]erely being unrepresented by counsel does not establish a good cause explanation for failing to file a timely answer." *Lockhart Concrete*, 336 NLRB 956, 957 (2001).

Further, the Board has held that a pro se respondent's ignorance of the Board's procedures does not constitute good cause for the failure to file a timely answer. See *Newark Symphony Hall*, 323 NLRB 1297 (1997) (good

[1] The chronology of events preceding this Decision and Order are as follows: A charge and amended charge were filed by Local 1234, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union) on March 22 and May 21, 2002, respectively. The Regional Director for Region 7 of the National Labor Relations Board issued a complaint on June 27, 2002, against the Respondent, alleging that the Respondent violated Sec. 8(a)(1) of the Act by interrogating prospective employees regarding their union membership and requiring employees as a condition of employment to state that they were not union members; and Sec. 8(a)(3) and (1) by refusing to hire employee Jeff Blair because of Blair's union activities. Although properly served with copies of the charge, amended charge, and complaint, the Respondent failed to file a timely answer. The region sent a subsequent letter to the Respondent on July 12, 2002, advising the Respondent that an answer filed then would be untimely and should be accompanied with an explanation for its late submission. The letter notified the Respondent that unless an answer were filed by July 26, 2002, a Motion for Default Summary Judgment would be filed. On August 15, 2002, the General Counsel filed a Motion for Default Summary Judgment with the Board. On August 21, 2002, the Board issued an Order Transferring the Proceeding to the Board and a Notice to Show Cause why the Motion for Default Summary Judgment should not be granted. On September 18, 2002, the Respondent filed a response to the Notice to Show Cause opposing the General Counsel's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] All dates refer to 2002 unless otherwise indicated.

[3] According to the Respondent, Miller had experienced problems with unnamed labor organizations at its Port Huron, Mich., construction site, "and believed that the subsequent Board procedures were simply continuing union efforts to fight him[.]"

cause not established by the fact that the pro se respondent had not retained labor counsel when the complaint issued and did not know how to answer the complaint.) See also *Urban Laboratories, Inc.*, 249 NLRB 867, 868 (1980) (good cause not established by fact that respondent was a nonlawyer who did not have adequate information about the Board's procedures.) Here, the Respondent's mistaken belief that the Board was somehow affiliated with labor organizations amounts to nothing more than a plea of ignorance of Board procedure, which does not excuse the failure to file a timely answer.

Our dissenting colleague raises or refers to the same arguments that the Board fully considered and rejected in *Patrician Assisted Living Facility*, 339 NLRB No. 149 (2003). We reject them again here, for the reasons set out in *Patrician*. Thus, we do not reach our colleague's assessment of the Respondent's assertions in the context of his analytical framework that the Board rejected in *Patrician*.[4]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Indiana corporation with an office and place of business in Goshen, Indiana, has been engaged in the construction industry as a framing contractor.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations in Port Huron, Michigan, provided services in excess of $50,000 to various entities, including, inter alia, Sterling Construction, Inc., each of which entities is directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Gene Miller, owner, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

About February 18 and March 10, at the Respondent's Port Huron jobsite, Gene Miller coercively interrogated prospective employees concerning their union support and membership. On the same dates, Miller conditioned employment for prospective employees upon their signing a statement confirming that they were not union members or supporters of the Union.

About February 18, at the Respondent's Port Huron jobsite, Miller refused to hire employee Jeff Blair because of his activities and support for the Union and to discourage employees from engaging in this and other concerted activities.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and violated Section 8(a)(1) of the Act. In addition, by refusing to hire Jeff Blair, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees and applicants for employment, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act. *FES*, 331 NLRB 9, 12–14 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). See also *Just Electric, Inc.*, 338 NLRB No. 96 (2003), and *Budget Heating & Cooling*, 332 NLRB No. 132 (2000) (not reporte in Board volumes). These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by refusing to hire Jeff Blair because of his union activity, we shall order the Respondent to offer him immediate instatement to the position to which he applied or, if that job no longer exists, to a substantially equivalent position, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed

[4] The dissent also emphasizes that the Respondent operates a small business. "It has long been established that an employer must apply no lesser degree of 'diligence and promptness' in NLRA matters than in 'other business affairs of importance.'" *Carmody, Inc.*, 327 NLRB 1230, 1231 fn. 6 (1999), citing *J.H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949). The Respondent has not met this standard.

NLRB v. Washington Star Co., 732 F.2d 974 (D.C. Cir. 1984), cited by our dissenting colleague, is clearly distinguishable. In that case, unlike here, the respondent made "a good faith, though mistaken, effort on the due date to file by mail." Id. at 977. In the instant case, the Respondent made no effort, good faith or otherwise, to comply with Sec. 102.20.

The dissent's reliance on *NLRB v. Central Mercedita, Inc.*, 273 F.2d 370 (1st Cir. 1959), is also misplaced. In that case, unlike here, the respondent missed the filing deadline by 2 days due in part to a telephone and taxi strike in Puerto Rico, which seriously disrupted business transactions and communications. Id. at 371. In the instant case, the Respondent missed the filing deadline by more than 2 months and does not claim that the delay was due to factors beyond its control.

in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful refusal to hire, and to notify Blair in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Country Lane Construction, Inc., Goshen, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating prospective employees concerning their union support and membership.

(b) Conditioning employment for prospective employees upon their signing a statement confirming that they were not union members or supporters of the Union.

(c) Refusing to hire applicants for employment because of their union activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeff Blair instatement to the position to which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed absent the discrimination against him.

(b) Make Jeff Blair whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Jeff Blair, and within 3 days thereafter notify him in writing that this has been done and that the unlawful refusal to hire him will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its jobsite in Port Huron, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 18, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 27, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Contrary to my colleagues, I would deny the General Counsel's Motion for Default Summary Judgment without prejudice to its renewal before an administrative law judge. In my view, which reflects the practice of Federal courts, rather than the Board, in determining whether to grant default judgment, the Respondent has raised a sufficient factual issue with regard to its good cause for failing to file a timely answer to the complaint. The majority's strict construction of the "good cause" requirement, as used in Section 102.20 of the Board's Rules and Regulations, lacks a sound policy basis and poses an undue risk of injustice.[1]

Facts

Stated briefly, the relevant facts are as follows. Respondent is a small construction company.[2] Its owner, Gene Miller, is a member of the Amish community in Indiana.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See, e.g., *NLRB v. Washington Star Co.*, 732 F.2d 974 (D.C. Cir. 1984), and *NLRB v. Central Mercedita, Inc.*, 273 F.2d 370 (1st Cir. 1959) (circuit courts refused to defer to the Board's harsh application of its deadlines for filing exceptions to decisions of administrative law judges).

[2] The unfair labor practice charges attached to the General Counsel's motion indicate that the Respondent employs six to eight individuals.

On June 27, 2002,[3] the General Counsel issued a complaint alleging that Respondent violated Sections 8(a)(1) and (3) of the Act, and setting an October 9 hearing date.[4] Respondent did not file a timely answer to the complaint and, as a result, on August 15, the General Counsel filed a Motion for Default Summary Judgment with the Board. On August 21, the Board issued an Order Transferring the Proceeding to the Board and a Notice to Show Cause why the Motion for Default Summary Judgment should not be granted. On September 18, Respondent, through counsel, filed a response to the Notice to Show Cause and attached a complete answer to the complaint.

In its response, Respondent acknowledges that it did not file a timely answer, but urges that we find that it had good cause for failing to do so. See Section 102.20 Board's Rules and Regulations. It represents, inter alia, that Miller, as a member of the Amish community, does not participate in "adversarial-type proceedings," and did not understand the Board's "purpose, powers, or procedures" until he contacted counsel.[5] Respondent further states that Miller experienced "severe labor related problems" at a Michigan construction site during the period at issue, and thought that the Board was a union (or affiliated with unions) and was a part of continuing union efforts to "fight him." Additionally, Respondent notes that "if the parties are unable to settle[,] [Respondent] pledges to make itself available for a hearing on the date selected by the Board and not to seek any extensions or adjournments."

Analysis

Section 102.20 of the Board's Rules and Regulations permits a late answer upon a showing of "good cause." The majority's grant of default judgment in this case is consistent with Board practice and precedent interpreting the "good cause" proviso. In my dissenting opinion in *Patrician Assisted Living Facility*, 339 NLRB No. 149 (2003), I express my criticism of that practice and precedent as "inconsistent with Section 102.121, which provides that the Board's rules and regulations 'shall be liberally construed'; with the Board's own stated policy preference for decisions on the merits; and . . . with the literal meaning of Section 102.20 itself."[6]

For reasons fully explained in *Patrician*, I believe the Board should apply to default judgment proceedings the same "good cause" standard used by the federal courts in deciding whether to set aside an entry of default. "In applying that standard, three factors typically will be material: the reason or reasons the answer was untimely, the merits of the respondent's defense,[7] and whether any party would suffer prejudice were the default set aside. Where appropriate, however, my analysis will take into consideration other relevant factors 'in a practical, commonsense manner, without rigid adherence to, or undue reliance upon, a mechanical formula.'"[8]

The first factor is the reason or reasons the answer was untimely. As noted above, in its response to the Notice to Show Cause, the Respondent, through counsel, acknowledges that it did not file a timely answer, but urges that we find that it had good cause for failing to do so. In this regard, it represents that Miller, as a member of the Amish community, does not participate in "adversarial-type proceedings," and did not understand the Board's "purpose, powers, or procedures" until he contacted counsel. Further, the Respondent states that Miller experienced "severe labor related problems" at a Michigan construction site during the period at issue, and thought that the Board was a union (or affiliated with unions) and was a part of continuing efforts to "fight him." These assertions suggest that the default was not willful. If the General Counsel were to raise the motion for default judgment before an administrative law judge, the Respondent would be called upon to explain how these asserted circumstances contributed to its failure to file a timely answer.

Turning next to the merits of the Respondent's defense, I note that the Respondent has now retained counsel and has provided an answer to the complaint. In full compliance with Section 102.20 of the Board's Rules,

[3] All dates refer to 2002 unless otherwise noted.

[4] 29 U.S.C. Sec. 158(a)(1) and 158 (a)(3).

[5] Respondent was apparently not represented by counsel until after the General Counsel moved for default summary judgment.

[6] I acknowledge that the view expressed here and in *Patrician* is contrary to the rationale expressed in *Associated Supermarket*, 338 NLRB No. 104 (2003), and *Sage Professional Painting Co.*, 338 NLRB No. 162 (2003), two early cases in which I participated as a panel member. If I was deciding those cases today, I would apply the analysis described herein.

[7] Ideally, a late-answering respondent will set forth the merits of its defense in its response to the Notice to Show Cause, or in an affidavit attached thereto. However, it would be both unrealistic and unfair to insist on such a showing in every case. Nothing in the Board's applicable controlling precedent or in the boilerplate language of its Notice to Show Cause puts a late-answering respondent on notice of the need to explain its defense, as opposed to simply admitting or denying the several allegations of the complaint without further comment. By contrast, an abundance of precedent puts a Federal-court defendant on notice that it must set forth the merits of its defense in order to obtain relief from a default. Accordingly, unless and until controlling Board precedent furnishes similar notice to late-answering respondents in Board cases, and the Notice to Show Cause is revised accordingly, I will overlook a respondent's failure to explain the merits of its defense in its response to the Notice to Show Cause where other relevant factors favor denying the motion for default judgment.

[8] *Patrician*, 339 NLRB No.149, slip op. at 7 fn. 29, quoting *KPS & Associates, Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 12 (1st Cir. 2003).

the answer separately admits or denies each allegation in the numbered paragraphs of the complaint. The answer does not explain its denial of allegations that Respondent violated the Act, but the Rules do not require any such explanation. If timely filed, Respondent's answer would clearly be sufficient to warrant a hearing on the complaint before an administrative law judge.[9]

Finally, no party would be prejudiced by denial of the General Counsel's motion for default judgment. The response to the Notice to Show Cause and Respondent's answer to the complaint were actually filed 3 weeks before the originally scheduled hearing date. There is no showing that relevant evidence has been lost or that the General Counsel's witnesses have become unavailable. And there is no showing that the alleged discriminatee would suffer prejudice. Finally, the Respondent has pledged to make itself available for a hearing on a date selected by the Board and not to seek any extensions or adjournments.

Based on the foregoing analysis, I would deny the General Counsel's Motion for Default Summary Judgment without prejudice to the General Counsel's right to raise the motion before an administrative law judge. If the General Counsel were to raise the motion, Respondent would be called upon to explain its confusion and lack of familiarity with the Board and its processes, and why Miller's membership in the Amish community contributed to Respondent's failure to file a timely answer. The General Counsel could subject Miller to cross-examination if he found it necessary. The judge would then have the discretion to decide on a full record whether Respondent has demonstrated good cause for its failure to file a timely answer.

I believe that, in these circumstances, such an approach preserves the integrity of our rules and fosters responsible labor relations.

Dated, Washington, D.C., August 27, 2003

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[9] See fn. 6.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate prospective employees concerning their union support and membership.

WE WILL NOT condition employment for prospective employees upon their signing a statement confirming that they were not union members or supporters of the Union.

WE WILL NOT refuse to hire applicants for employment because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jeff Blair instatement to the position to which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed absent the discrimination against him.

WE WILL make Jeff Blair whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire Jeff Blair, and WE WILL within 3 days thereafter notify him in writing that this has been done and that the unlawful refusal to hire him will not be used against him in any way.

COUNTRY LANE CONSTRUCTION, INC.